



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS-2023-0022]

RIN 0750-AL88

Defense Federal Acquisition Regulation Supplement: Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region (DFARS Case 2023-D015)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2023 that prohibits the use of funds to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from the Xinjiang Uyghur Autonomous Region.

DATES: Effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

Comment due date: Comments on the interim rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2023-D015 using any of the following methods:

o *Federal eRulemaking Portal:* <https://www.regulations.gov>.

Search for DFARS Case 2023-D015. Select "Comment" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2023-D015" on any attached documents.

o *Email:* osd.dfars@mail.mil. Include DFARS Case 2023-D015 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Kimberly Bass, telephone 703-717-3446.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 87 FR 76980 on December 16, 2022, to implement section 848 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) FY 2022 (Pub. L. 117-81). This interim rule implements section 855 of the NDAA for FY 2023 (Pub. L. 117-263), which repeals section 848 of the NDAA for FY 2022, including the requirement for a certification from offerors for contracts with DoD stating the offeror has made a good faith effort to determine that forced labor from Xinjiang Uyghur Autonomous Region of the

People's Republic of China (XUAR) was not or will not be used in the performance of a contract.

Section 855 adds 10 U.S.C. 4661, which prohibits the use of DoD funds for any fiscal year to be obligated or expended to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from XUAR. Section 855 also requires offerors or awardees of a DoD contract to make a good faith effort to determine that forced labor from XUAR will not be used in the performance of a DoD contract. This interim rule requires offerors to represent, by submission of an offer, that they have made, and requires contractors to make, a good faith effort to determine that forced labor from XUAR will not be used in the performance of a DoD contract. The term "forced labor" is revised and is defined, along with "XUAR" at 10 U.S.C. 2496 (see section 651 of the NDAA for FY 2023). The definition of "person" is removed in its entirety.

II. Discussion and Analysis

Two respondents submitted public comments in response to the interim rule published at 87 FR 76980 on December 16, 2022. DoD reviewed the public comments in the development of this interim rule. A discussion of those comments and the changes made to the rule as a result of those comments is provided as follows:

A. Summary of Significant Changes from the Interim Rule

DoD made the following changes in this interim rule:

1. At DFARS 225.7022-1, revised the reference to implementation of section 855 of the NDAA for FY 2023 and 10 U.S.C. 4661 with conforming revisions throughout.

2. For consistency with the requirements of section 855 of the NDAA for FY 2023, at DFARS 225.7022-2 the definition of "forced labor" was revised to align with 10 U.S.C. 2496, with conforming changes throughout. The term "XUAR" is also defined at 10 U.S.C. 2496, and the cross-reference is added to the definition. References to the definition of "person" are removed for consistency with the repeal of section 848 of the NDAA for FY 2022 and the revised statutory requirement in section 855 of the NDAA for FY 2023.

3. The certification requirement for offerors is replaced with a representation.

B. Analysis of Public Comments

1. Strong support for the rule

Comment: A respondent strongly supported the interim rule. The respondent noted that this prohibition on the purchase of products from the Xinjiang Uyghur Autonomous Region is an important step in preserving the United States as the leader of the free world and protects our national security.

Response: DoD acknowledges the support for the rule.

2. Scope of the prohibition

Comment: A respondent commented the scope and applicability of the rule should be clarified. The respondent questioned the applicability to products, or if the use of tools that could

have been made of parts made with forced labor from XUAR, are to also be covered by the prohibition.

Response: The rule implements section 855 of the NDAA for FY 2023. Product, as defined at Federal Acquisition Regulation (FAR) 2.101, Definitions, has the same meaning as "supplies". The FAR definition of "supplies" means all property except land or interest in land. It includes (but is not limited to) public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories; aircraft and aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing. In accordance with the FAR definition of "product" the scope of the prohibition will include any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from any entity that has used labor from within or transferred from XUAR made with forced labor.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold, for Commercial Services, and for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This DFARS rule implements section 855 of the NDAA for FY 2023. Section 855 prohibits the use of DoD funds for any fiscal year to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from XUAR and requires offerors or awardees of DoD contracts to make a good

faith effort to determine that forced labor from XUAR will not be used in the performance of a DoD contract.

This rule amends the solicitation provision at DFARS 252.225-7059, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region-Representation, and the contract clause at DFARS 252.225-7060, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region. The clause at DFARS 252.225-7060 is prescribed for use in solicitations and contracts utilizing funds appropriated or otherwise made available for any fiscal year, including solicitations using FAR part 12 procedures for the acquisition of commercial services and commercial products including COTS items. DoD made the determination to apply the rule to contracts valued at or below the simplified acquisition threshold (SAT) and to the acquisition of commercial services and commercial products, including COTS items, as defined at FAR 2.101.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law

will apply to them. The Principal Director, Defense Pricing and Contracting, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Applicability to Contracts for the Acquisition of Commercial Services and Commercial Products, Including COTS Items.

10 U.S.C. 3452 exempts contracts and subcontracts for the acquisition of commercial services and commercial products (including COTS items) from provisions of law enacted after October 13, 1994, that, as determined by the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), set forth policies, procedures, requirements, or restrictions for the acquisition of property or services unless—

The provision of law—

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 4862 or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 4863; or
- Specifically refers to 10 U.S.C. 3452 and states that it shall apply to contracts and subcontracts for the acquisition of commercial services and commercial products (including COTS items); or USD(A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial products and services from the applicability of the provision. This

authority has been delegated to the Principal Director, Defense Pricing and Contracting.

C. Determinations

Section 855 is silent on applicability to contracts and subcontracts in amounts at or below the SAT or for the acquisition of commercial products and commercial services. Also, the statute does not provide for civil or criminal penalties. Therefore, it does not apply to the acquisition of contracts or subcontracts in amounts not greater than the SAT or the acquisition of commercial services and commercial products (including COTS items), unless the Principal Director, Defense Pricing and Contracting, makes a written determination as provided for in 41 U.S.C. 1905 and 10 U.S.C. 3452.

The solicitation provision and contract clause provided are necessary to implement the statutory restrictions and to protect the contracting officer from violating the prohibition on the use of funds to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of a forced labor program.

If the solicitation provision and contract clause are not included in solicitations and contracts valued at or below the SAT and for the acquisition of commercial services and commercial products (including COTS items), it becomes more likely that a contracting officer could procure a prohibited product, thereby undermining the overarching public policy

purpose of the law. Subjecting FAR part 13 simplified acquisitions to section 855 will not impact simplified acquisitions conducted through the use of the Governmentwide commercial purchase card or the SF 44, as these acquisitions are excepted from section 855.

An exception for contracts for the acquisition of commercial services and commercial products, including COTS items, would exclude some high dollar value contracts, thereby undermining the overarching public policy purpose of the law. However, the prohibition in section 855 covers only "knowingly" procuring covered items. It would be unreasonable to expect the parties to a procurement through the use of the Governmentwide commercial purchase card or the SF 44 to know whether the commercial products or commercial services being procured are mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of a forced labor program.

Based on the findings above, it would not be in the best interest of the United States to exempt acquisitions not greater than the SAT (except for purchases made regardless of dollar value through the use of the Governmentwide commercial purchase card or the SF 44) and acquisitions of commercial services or commercial products, including COTS items, from the applicability of section 855 of the NDAA for FY 2023.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

DoD does not expect this interim rule to have a significant economic impact on a substantial number of small entities within

the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule replaces a burdensome certification requirement with a representation requirement. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is amending the DFARS to implement section 855 of the National Defense Authorization act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117-263). Section 855 prohibits the use of DoD funds for any fiscal year to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from the Xinjiang Uyghur Autonomous Region of the People's Republic of China (XUAR). Section 855 requires offerors or awardees of a DoD contract to make a good faith effort to determine that forced labor from XUAR will not be used in the performance of a DoD contract. In addition, section 855 repeals section 848 of the NDAA for FY 2022 (Pub. L. 117-81), which required a certification from offerors that they had made a good faith effort to determine that forced labor from XUAR was not or will not be used in the performance of a DoD contract.

The objective of the rule is to implement the prohibition and the requirement for offerors or contractors to make a good faith effort to determine that forced labor from XUAR will not be used in the performance of a DoD contract. The rule revises the solicitation provision at DFARS 252.225-7059, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region—Representation, to remove the certification requirement and

include a representation requirement. The legal basis for this rule is section 855 of the NDAA for FY 2023.

DoD reviewed data obtained from the Federal Procurement Data System for FY 2020, 2021, and 2022 for DoD purchases of supplies or end products valued above the micro-purchase threshold, including commercial products and commercially available off-the-shelf items. DoD made an average of 374,735 awards to 16,122 unique entities, of which 154,515 awards were made to 12,187 unique small entities. In addition to the small entities that received awards, DoD estimates there were approximately 621,718 unsuccessful offerors. Note that the unsuccessful offerors are not unique entities; in other words, a single entity may have been counted more than once as an unsuccessful offeror. The rule will apply to successful offerors that receive awards and unsuccessful offerors.

The solicitation provision at DFARS 252.225-7059, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region-Representation, requires offerors to represent, by submission of an offer, that the offeror has made a good faith effort to determine that forced labor from XUAR will not be used in the performance of a contract resulting from a solicitation containing the provision. Small entities that sell products to DoD will be subject to this requirement when they submit offers for DoD contracts. The rule does not require any other reporting or recordkeeping.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

The section 855 prohibition will not apply to purchases under the micro-purchase threshold made using the Governmentwide commercial purchase card or to purchases using the SF 44, Purchase Order-Invoice-Voucher (see DFARS 213.306). DoD was unable to identify any other alternatives that would reduce burden on small businesses and still meet the objectives of the statute. Moreover, this interim rule removes the certification requirement that was required by section 848 of the NDAA for FY 2022, thereby removing the associated burden.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2023-D015), in correspondence.

VII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35). OMB, under the prior interim rule for DFARS Case 2022-D008 that is superseded by this interim rule, assigned OMB Control Number 0750-0007, Prohibition on Certain

Procurements from the Xinjiang Uyghur Autonomous Region—
Certification; DFARS Provision 252.225-70UU. Upon publication
of this interim rule and removal of the certification reporting
requirement, OMB Control Number 0750-0007 will be canceled, as
it is no longer required.

VIII. Determination to Issue an Immediately Effective Interim Rule

A determination has been made under the authority of the
Secretary of Defense that urgent and compelling reasons exist to
promulgate this interim rule effective immediately without prior
opportunity for public comment (41 U.S.C. 1707(d)). This action
is necessary to implement section 855 of the National Defense
Authorization Act for Fiscal Year 2023 (Pub. L. 117-263; 10
U.S.C. 4661). Section 855 repeals section 848 of the NDAA for
FY 2022 (Pub. L. 117-81), including the requirement to obtain a
certification from offerors for contracts with DoD stating the
offeror has made a good faith effort to determine that forced
labor from XUAR was not or will not be used in the performance
of a contract. Section 855 prohibits the use of funds to
knowingly procure any products mined, produced, or manufactured
wholly or in part by forced labor from XUAR or from any entity
that has used forced labor from within or transferred from XUAR
as part of any forced labor program, thereby extending the
prohibition initiated under section 848 of the NDAA for FY 2022.
The section 855 prohibition requires the offeror to make a good

faith effort to determine that forced labor from XUAR was not or will not be used in the performance of a contract.

This interim rule must be effective immediately, in the interest of avoiding further genocide in XUAR (see the Joint Explanatory Statement To Accompany the National Defense Authorization Act for Fiscal Year 2022), to mitigate the risks associated with procuring products produced or manufactured using forced labor from XUAR, and to ensure contracting officers comply with the new statutory requirements in section 855. Public Law 117-263 containing section 855 was enacted on December 23, 2022, and section 855 is effective not later than 180 days after the date of the enactment, or June 21, 2023.

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

2. Amend section 212.301 by revising paragraphs (f)(ix)(KK) and (LL) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

(f) * * *

(ix) * * *

(KK) Use the provision at 252.225-7059, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region—Representation, as prescribed in 225.7022-5(a), to comply with section 855 of the National Defense Authorization Act for Fiscal Year 2023 (Pub. L. 117-263) and 10 U.S.C. 4661.

(LL) Use the clause at 252.225-7060, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region, as prescribed in 225.7022-5(b), to comply with section 855 of the National Defense Authorization Act for Fiscal Year 2023 (Pub. L. 117-263) and 10 U.S.C. 4661.

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PART 225—FOREIGN ACQUISITION

3. Revise section 225.7022-1 to read as follows:

225.7022-1 Scope.

This section implements section 855 of the National Defense Authorization Act for Fiscal Year 2023 (Pub. L. 117-263) and 10 U.S.C. 4661.

4. Revise section 225.7022-2 to read as follows:

225.7022-2 Definitions.

As used in this section—

Forced labor means any work or service that is exacted from any person under the menace of any penalty for nonperformance and that the worker does not offer to perform (10 U.S.C. 2496).

XUAR means the Xinjiang Uyghur Autonomous Region of the People's Republic of China (10 U.S.C. 2496).

225.7022-3 [Amended]

5. Amend section 225.7022-3 by removing "for fiscal year 2022" and adding "for any fiscal year" in its place.

225.7022-5 [Amended]

6. Amend section 225.7022-5-

a. In paragraph (a) by-

i. Removing "Certification" and adding "Representation" in its place; and

ii. Removing "commercial products and commercial services and COTS items" and adding "commercial products, commercial services, and COTS items" in its place; and

b. In paragraph (b) by-

i. Removing "for fiscal year 2022" and adding "for any fiscal year" in its place; and

ii. Removing "commercial products and commercial services and COTS items" and adding "commercial products, commercial services, and COTS items" in its place.

PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Amend section 252.225-7059-

a. By revising the clause heading, title, and date;

b. In paragraph (a) by removing ", person,"; and

c. By revising paragraph (c).

The revisions read as follows:

**252.225-7059 Prohibition on Certain Procurements from the
Xinjiang Uyghur Autonomous Region-Representation.**

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PROHIBITION ON CERTAIN PROCUREMENTS FROM THE XINJIANG UYGHUR
AUTONOMOUS REGION-REPRESENTATION (JUN 2023)

* * * * *

(c) *Representation.* By submission of its offer, the Offeror represents that it has made a good faith effort to determine that forced labor from XUAR will not be used in the performance of a contract resulting from this solicitation.

8. Amend section 252.225-7060:

a. By revising the clause date;

b. By revising paragraphs (a) and (b); and

d. In paragraph (c), by removing "commercial products, commercially available off-the-shelf items, and commercial services" and adding "commercial products, commercial services, and commercially available off-the-shelf items" in its place.

The revisions read as follows:

**252.225-7060 Prohibition on Certain Procurements from the
Xinjiang Uyghur Autonomous Region.**

* * * * *

PROHIBITION ON CERTAIN PROCUREMENTS FROM THE XINJIANG UYGHUR
AUTONOMOUS REGION (JUN 2023)

(a) *Definitions.* As used in this clause—

Forced labor means any work or service that is exacted from any person under the menace of any penalty for nonperformance and that the worker does not offer to perform (10 U.S.C. 2496).

XUAR means the Xinjiang Uyghur Autonomous Region of the People's Republic of China (10 U.S.C. 2496).

(b) *Prohibition.* In accordance with 10 U.S.C. 4661, none of the funds appropriated or otherwise made available for DoD may be used to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR. The Contractor shall make a good faith effort to determine that forced labor from XUAR will not be used in the performance of this contract (section 855, Pub. L. 117-263).

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